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STATUTE

Revenue Act of 1926, section 303 (a), as amended 15

Supreme Court of the United States

OCTOBER TERM, 1945.

INDUSTRIAL TRUST COMPANY ET AL.
EXECUTORS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

The petitioners, Industrial Trust Company, Milton Sulzberger, and Katherine M. Hahn, executors of the will of J. Jerome Hahn, late of Providence, Rhode Island, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered October 29, 1945 in the case between the above-named parties, docketed therein as No. 4038. Said judgment affirmed a decision of the Tax Court of the United States dealing with the deduction of gifts to charity in computing estate taxes under the Internal Revenue Code.

Opinions Below.

The memorandum opinion of the Tax Court is printed in the Record, pp. 44-46. The opinion of the Circuit Court of Appeals is reported in 151 F. 2d 592, and is printed in the Record, pp. 59-65.

Jurisdiction.

This Court has jurisdiction to review said judgment under U. S. Code, Title 28, Sec. 347.

This application is made within three months after the entry of such judgment, as required by Sec. 350.

Question Presented.

In computing the Federal estate tax are the valuation and deduction from the gross estate of a charitable bequest of a remainder interest under a testamentary trust precluded, regardless of the degree of the improbability that the *corpus* will be invaded, solely because the will confers upon the trustees the following power to invade *corpus*:

> "I authorize and direct my Trustees, if at any time, during the lifetime of my wife, in their sole and uncontrolled opinion and discretion, to be exercised by the Trustees other than my wife, the fixed income payable to my wife under this my will, shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure, to pay over to her, in addition to said fixed income for her personal use and benefit such and so much, from time to time, of the net income of my trust estate, or if that should be insufficient then such and so much of the principal of my trust estate, as said Trustees may deem to be required for any purpose approved by them, and all such income or principal paid over to my wife under the powers of this paragraph shall

be freed and discharged of all trusts. I direct that said powers and discretions shall be liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support. I also give a like power and discretion to my Trustee to make additional payments out of income or principal, or both, to my mother and sister, and for like purposes, and with like effect."

Statute Involved.

The statute involved is the Revenue Act of 1926, Sec. 303, as amended by the Revenue Act of 1934, Sec. 402 (a) and as enacted into the Internal Revenue Code, Sec. 812 as in force December 6, 1938. The relevant part of the statute is set out in the appendix (*infra*, p. 15).

Statement.

The facts are undisputed. The decedent, J. Jerome Hahn, died December 6, 1938, testate. The gross estate was valued at $1,873,436.05. (R. 26, 27.)

The will contained various direct pecuniary legacies amounting to $26,500. Claims and expenses equalled $126,500, and the admitted estate tax was $54,700. Disregarding the tax in dispute, the residuary estate was thus approximately $1,680,000. (R. 11, 13-14.)

This residuary estate was given to trustees to pay from the income $12,000 per year to the decedent's widow, Katherine M. Hahn; $6,000 per year to the decedent's mother, Rose Hahn; and $6,000 per year to the decedent's sister, Beulah May Nordlinger. The trustees were also directed to maintain the residence of the decedent and his widow during its occupancy by her and to maintain for her their summer home. Excess income was to be accumulated and disposed

of with the *corpus* upon termination of the trust. (R. 14, 15, 17.)

Upon the decease of the *widow,* payments of small specific amounts aggregating $21,000 were to be made to nine charitable institutions. Upon the death of the widow and either the death of all other "annuitants" or provision being made for them by purchase of annuities, the sum of $150,000 was to be paid to the Miriam Hospital and 7/8 of the balance of the trust *corpus* to the Rhode Island Hospital. The remaining 1/8 of *corpus* or $40,000, whichever was less was given to certain relatives of the decedent. (Ex. B, R. 14-17.)

The will contained provisions quoted in the question on p. 2 authorizing the trustees to use the excess net income, or *corpus* if necessary, for any expense deemed by the trustees, other than the widow, to be proper for the comfort and pleasure of the life tenants.

Judge Hahn, the decedent, was born in Albany, New York, on August 20, 1868. He was admitted to the Bar of the State of Rhode Island on July 18, 1891 and engaged in the practice of his profession in that State until March 27, 1919, when he became an associate justice of the Superior Court. On March 16, 1931 he became an associate justice of the Supreme Court of the State of Rhode Island, in which capacity he served until his retirement on January 1, 1935. (R. 28.)

Katherine M. Hahn, the widow, employed one maid in the home with a helper at irregular intervals. She had purchased one automobile since the decedent's death, which was at the time of the hearing nearly four years old, and she had been accustomed to make one annual trip to Florida. (R. 28.)

In accordance with the provisions of the will the trustees have paid to Mrs. Hahn the sum of $12,000 each year and have, in the exercise of their discretion, paid to her additional

sums from income. During the four full years succeeding the death of the testator the trustees paid to her in the aggregate, including her annuity of $12,000, the following sums:

1939	—	$21,594.91	
1940	—	21,836.81	
1941	—	24,054.38	
1942	—	26,116.72	(R. 31 – Ex. 1.)

Rose Hahn, the mother of the decedent, being 90 years old, was an inactive person, and the trustees made no payments to her in addition to the sum of $6,000 per year as required by the will, until her death on November 27, 1941. (R. 28-29, 31. Ex. 1).

Beulah May Nordlinger, the sister of the decedent, had substantial income of her own which averaged from $15,000 to $20,000 per year between 1939 and the time of her death on June 23, 1943. She was never paid any sums by the trustees in addition to the fixed amount of $6,000 per year required by the will. (R. 29, 31 – Ex. 1.)

The will also provided two small annuities of $1,000 and $500 respectively, which are not of importance on the questions presented.

The estate, being substantial, produced a large income, and during the four full years prior to the Tax Court hearing the income for each year was as follows:

1939	—	$93,153.38
1940	—	107,225.70
1941	—	105,445.78
1942	—	100,436.97

Total disbursements, including all expenses of the trustees as well as payments to beneficiaries were as follows:

1939	—	$56,695.19
1940	—	69,848.15
1941	—	78,719.26
1942	—	69,802.22

Thus there were the following annual accumulations:

1939	—	$36,458.19
1940	—	37,377.55
1941	—	26,726.52
1942	—	30,634.75

Total accumulated income at the end of 1942 was $131,197.01. (R. 31-32. Exhibits 1 and 2.)

The petitioners have computed the present values of the various charitable gifts as follows:

(a)	The Congregation Sons of Israel and David, Providence, R. I.	$3,360.60
(b)	The Jewish Orphanage, Providence, R. I.	1,344.24
(c)	The Jewish Home for the Aged, Providence, R. I.	1,344.24
(d)	St. Joseph's Hospital, Providence, R. I.	1,344.24
(e)	The Providence Lying-In Hospital, Providence, R. I.	1,344.24
(f)	The Homeopathic Hospital, Providence, R. I.	1,344.24
(g)	Butler Hospital, Providence, R. I.	1,344.24
(h)	Boston University, Boston, Mass.	1,344.24
(i)	Providence Community Fund, Inc., Providence, R. I.	1,344.24
(j)	Miriam Hospital, Providence, R. I.	79,135.50
(k)	Rhode Island Hospital, Providence, R. I.	1,233,045.55

(R. 29.)

It is admitted by the Commissioner that the beneficiaries named in the preceding paragraph are charitable beneficiaries within the meaning of Section 812 (d) of the Internal Revenue Code and that the values of the gifts stated in items (a) to (i) inclusive are computed in accordance with the applicable regulations. The values of items (j) and (k) are accepted for argument with the reservation by the Commissioner that the computation be reviewed as to its actuarial exactness if the deduction is otherwise allowable. (R. 29-30, 42.)

On the basis of these computations the petitioners, in the estate tax return, claimed a deduction in the sum of $1,326,274.57 in computing the estate tax.

The Commissioner, because of the discretionary power of the trustees to use income and principal, disallowed all the above items as deductions and assessed a deficiency in tax of $382,188.88.

The Tax Court upheld the action of the Commissioner on the authority of *Merchants National Bank* v. *Commissioner,* 320 U. S. 256. No findings of fact were made as the Court held the question to be one of law. (R. 44-46).

The Circuit Court of Appeals for the First Circuit affirmed the decision of the Tax Court, also relying on *Merchants National Bank* v. *Commissioner.*

Specification of Errors

1. The Court erred in applying the ruling of the Supreme Court in *Merchants National Bank* v. *Commissioner,* supra, as a rule of law to be applied regardless of the factual degree of probability of depletion of *corpus.*

2. The Court erred in affirming the decision of the Tax Court as a conclusion of law without findings of fact as to the probability of payment of the charitable bequests.

3. The Court erred in failing to follow the composite rule established by this Court in the cases of *Ithaca Trust Company* v. *United States*, 279 U. S. 151, and *Merchants National Bank* v. *Commissioner*, supra.

4. The Court erred in ruling that as a matter of law, based solely upon the terms of the will and regardless of other facts differing substantially from those in the *Merchants National Bank* case, the values of the various charitable bequests could not be determined at the death of the decedent.

5. The Court erred in ruling that as a matter of law, based solely upon the terms of the will and regardless of other facts differing substantially from those in the *Merchants National Bank* case, the values of the charitable bequests of specific amounts could not be determined at the death of the decedent.

Reasons for Granting the Writ.

The decision of the First Circuit Court in this case is in conflict with decisions of other Circuit Courts rendered since the decision of this Court in the *Merchants National Bank* case.[1] The Circuit Court of Appeals in its decision misconstrues the opinion in the *Merchants Bank* case in applying it beyond its true scope and thus repudiates the rule established by the *Ithaca Trust* case. The First Circuit Court is attempting to carry out the strict rule previously announced by it which is at variance with the basic conceptions of other Circuit Courts,[2] and which is believed not to follow the theory adhered to by this Court.

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[1] *Commr.* v. *Robertson*, CCA 4, 141 F. 2d 855.
Commr. v. *Wells Fargo*, CCA 9, 145 F. 2d 130.
Both cases, although decided after the *Merchants National Bank* case affirmed decisions of the Tax Court entered prior to the *Merchants National Bank* opinion.

[2] Cf. opinions of First Circuit Court in *Merchants National Bank* v. *Commr.*, 132 F. 2d 483, and this case with opinions of Ninth Circuit Court in *Commr.* v. *Bank of America*, 133 F. 2d 753, and *Commr.* v. *Wells Fargo*, 145 F. 2d 130, and with opinion of Fourth Circuit Court in *Commr.* v. *Robertson*, 141 F. 2d 855.

The question presented is of great importance in the administration of the estate tax law and it is submitted that some clarification of the precise limits of the theories of the *Ithaca Trust Company* and *Merchants Bank* cases is needed.*

Respectfully submitted,

HAROLD A. ANDREWS,
STUART H. TUCKER,
Attorneys for the Petitioners.

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*The Board of Tax Appeals and the Tax Court consistently *allowed* deductions in similar cases subsequent to the *Ithaca Trust Company* case and prior to the *Merchants National Bank* case.

Sanderson v. *Commr.*, 18 BTA 221.
Boston Safe Deposit v. *Commr.*, 21 BTA 394.
Michigan Trust Co. v. *Commr.*, 27 BTA 556.
Hallett v. *Commr.*, 29 BTA 494.
Caughey v. *Commr.*, 44 BTA 385.
Field v. *Commr.*, 45 BTA 270. (*Merchants* case.)

The Tax Court has *denied* deductions in all but one case since the *Merchants National Bank* case.

Schumacker v. *Commr.*, TC. Memo, Docket No. 109988.
DeCastro v. *Commr.*, TC. Memo, Docket No. 5071.
Wiggin v. *Commr.*, 3 TC. 464.
John W. Holmes, 5 TC., No. 156.
Nathan P. Cutler, Jr., 5 TC., No. 159.

Allowed in Wetherell v. *Commr.*, 4 TC. 678. (Petition for review dismissed on motion of Commissioner.)

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

1. The Composite Rule of the Ithaca Trust and Merchants Bank Cases is That the Value of Charitable Gifts in Remainder Should be Determined on a Factual Basis.

The fundamental and important question presented by this petition is whether under the decisions in the *Ithaca Trust Company* case and the *Merchants National Bank* case, the mere existence of a power to invade *corpus*, like that involved in the present case, precludes the valuation of the remainder interests although it is as certain upon an examination of the facts, as is anything in human affairs, that the *corpus* will not be invaded.

The Circuit Court of Appeals for the First Circuit in deciding this case gave an affirmative answer to that question, holding that the mere existence of such a power is conclusive and makes all other facts bearing on the probability of invasion of the *corpus* irrelevant.

The Circuit Courts of Appeals for the Fourth and the Ninth Circuits have given a negative answer to that question, holding that the extent of a power is merely one of the facts to be considered and that all other facts bearing on the probability of invasion of *corpus* are relevant.[1]

The First Circuit Court appears to have assumed that this Court has adopted the very strict ruling of the First Circuit on this question as exemplified in the Circuit Court's opin-

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[1] *Commr.* v. *Robertson*, CCA4, 141 F. 2d 855.
Commr. v. *Wells Fargo*, CCA9, 145 F. 2d 130.
Although in the *Robertson* and *Wells Fargo* cases the terms of the powers are not identical with the words used in the power in this case, it is difficult to see how either of them, or particularly the power in the *Robertson* case, can be substantially distinguished from that in the instant case. The phrase "best interests" in the *Robertson* case does not impose any precise limit

ions in *Gammons* v. *Hassett*, 121 F. 2d 229, and in the *Merchants National Bank* case, 132 F. 2d 483.

No other Circuit Court has accepted or applied such a harsh rule either before or since the *Merchants Bank* case.[5]

It is submitted that the views of the other Circuit Courts of Appeal are sounder than that of the First Circuit Court and that the decisions of the Fourth and Ninth Circuit Courts correctly construe the decision in the *Merchants National Bank* case as merely holding that the power to invade *corpus* involved in that case when taken together with the other facts in that case bearing on the probability of invasion, precluded a finding of fact that there was no probability of invasion.

The view adhered to by the Circuit Court of Appeals in the present case involves holding that the trustees of an estate of over $1,500,000, charged with making annual payments of $12,000 to the widow and $6,000 each to an aged mother and a sister, with an available annual income of $100,000, might under the power in the will, have invaded *corpus* to such an extent that there would have been less than $171,000 left for the payment of the ten charitable pecuniary bequests, although such an invasion would have made impossible the specific income payments required by the will, and in view of the uncertain duration of the widow's life might have seri-

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on the trustee's discretion. Clearly the theory of determining the questions as questions of fact, as applied in the *Robertson* and *Wells Fargo* cases, is inconsistent with the theory of determining the question as one of law, as applied in this case.

In the *Robertson* case the Court said per Soper, J., "Notwithstanding this decision (*Merchants Bank* case), we think the conclusions of the Tax Court in the pending case, resting as they do upon a finding of fact, must be affirmed."

[5] *Hartford Conn. Trust* v. *Eaton*, CCA2, 36 F. 2d 710.
First National Bank v. *Snead*, CCA5, 24 F. 2d 186.
Lucas v. *Mercantile Trust Co.*, CCA8, 43 F. 2d 39.
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Commr. v. *Robertson*, CCA4, 141 F. 2d 855.
Commr. v. *Wells Fargo*, CCA9, 145 F. 2d 130.

ously jeopardized the very comfort which the testator sought to insure. It is submitted that this Court, in deciding the *Merchants Bank* case, did not lay down a rule requiring such a result.

The true rule should be one of reasonable judgment upon all the facts, and such a rule results from a reconcilement of the *Ithaca Trust Company* and *Merchants National Bank* cases.

Such a result is also desirable as consistent with the purpose of Congress to benefit charities through the application of Sec. 812 (d) of the Revenue Code. The deduction allowed by this section should stand or fall upon something more substantial than literal technicalities evolved *in vacuo* divorced from the underlying and important facts.

Until the conflicting views of the Circuit Courts of Appeal are harmonized, the charities in the First Circuit are in a distinctly less advantageous position than those in other Circuits.

2. The Tax Court Should be Permitted and Required to Decide Upon the Facts, the Deductibility of Charitable Bequests.

Recently much emphasis has been laid upon the true and intended function of the Tax Court as a final arbiter in tax disputes.[8]

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[8] *Dobson* v. *Commissioner*, 320 U. S. 492.
Bingham Trust v. *Commissioner*, 325 U. S. ——, 65 Sup. Ct. 1232.
Kelley Co. v. *Commissioner* No. 36
Talbot Mills v. *Commissioner* No. 47 } Sup. Ct., Dec. Jan. 7, 1946.

If the Tax Court is to fulfill its proper function it should not be restricted by this Court in its treatment of essentially factual problems.

The issue presented in this case, the valuation of a remainder interest under a will, is basically an issue of fact and should be decided by the Tax Court as a fact upon a consideration of all the evidence. Such procedure prevailed up to the time of the *Merchants National Bank* case (supra, p. 9 n. 3). The Tax Court now apparently considers its long practice completely reversed as disapproved by this Court.[4] A rule which worked so well for so long should not be lightly cast aside. It should be frankly recognized that the *Merchants National Bank* case was one of limited application and not intended to change completely the power of the Tax Court to decide similar cases upon a factual basis.

It is believed that if the Tax Court were permitted to consider the facts in this case a different result would have been reached.

3. Substantial Differences Make the Rule of the Merchants National Bank Case Inapplicable to This Case.

It is submitted that there are substantial differences between the *Merchants National Bank* case and this case which make the strict rule of the former inapplicable. These differences may be briefly summarized as follows:

a. The available income here is greatly in excess of that in the *Merchants National Bank* case.

b. The life tenant in the *Merchants* case was absolutely entitled to all income, but here the life tenants are en-

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[4] Compare, however, affirmance of Tax Court in *Commr.* v. *Robertson, supra,* on basis of Dobson case.

titled to only a portion of the income, so that there is a substantial margin and accumulation of income which is subject to the trustees' discretion and must be exhausted before *corpus* can be invaded.

c. The will here contains no expression of preference for the life tenants over the remaindermen such as was contained in the will in the *Merchants* case.

d. The will here contains, in addition to the residuary gift to charity, gifts of relatively small specific amounts which are factually certain of payment.

The presence of these important and substantial differences is believed to warrant review by this Court to determine whether the Tax Court should be required to consider all the evidence presented and on that evidence determine the factual probability that *corpus* will be invaded to such an extent as to jeopardize either the specific or residuary provisions for charity.

Respectfully submitted,

HAROLD A. ANDREWS,
STUART H. TUCKER,

Attorneys for the Petitioners.

Appendix.

Revenue Act of 1926, section 303 (a) (3), as amended by Revenue Act of 1932, section 807 and Revenue Act of 1934, section 408, (Internal Revenue Code, section 812 (d)):

"For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

* * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 781

INDUSTRIAL TRUST COMPANY ET AL., EXECUTORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 44–46) entered December 28, 1943, is unreported. The opinion of the United States Circuit Court of Appeals for the First Circuit, filed October 29, 1945 (R. 59–64), is reported in 151 F. 2d 592.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 29, 1945. (R. 64–65.) The petition for certiorari was filed January 28, 1946. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether charitable bequests in remainder were deductible for estate tax purposes where trustees were given broad powers to divert the corpus to the decedent's wife, mother, and sister for any expenses when deemed by the trustees to be proper for their "comfort or pleasure."

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

The facts were stipulated (R. 26–30), and so far as material here may be summarized as follows:

J. Jerome Hahn, a resident of Providence, Rhode Island, died testate December 6, 1938, leaving a net estate for basic tax adjusted by the Commissioner of $1,658,460.45 (R. 10), the Commissioner having disallowed a deduction of $1,326,274.57, claimed as charitable bequests. The decedent left him surviving his widow, who is still living, then aged 65; his mother, since deceased, then aged 90, and his sister, now deceased, then aged 60 (R. 26–27).

By his will, the decedent devised and bequeathed to his wife, a residence and certain personal prop-

erty, and to sundry other individual beneficiaries a total of $26,500 in cash (R. 13–14).

By the thirteenth paragraph of his will the decedent transferred in trust all of the rest and residue of his estate, providing for the payment out of the income thereof of $12,000 annually to his wife, $6,000 annually to his mother, and a like amount to his sister (R. 14). Subdivision (3) of the paragraph then provided as follows (R. 15–16):

> (3) I authorize and direct my Trustees, if at any time, during the lifetime of my wife, in their sole and uncontrolled opinion and discretion, to be exercised by the Trustees other than my wife, the fixed income payable to my wife under this my will, shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure, to pay over to her, in addition to said fixed income for her personal use and benefit such and so much, from time to time, of the net income of my trust estate, or if that should be insufficient then such and so much of the principal of my trust estate, as said Trustees may deem to be required for any purpose approved by them, and all such income or principal paid over to my wife under the powers of this paragraph shall be freed and discharged of

> all trusts. I direct that said powers and discretions shall be liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support. I also give a like power and discretion to my Trustee to make additional payments out of income or principal, or both, to my mother and sister, and for like purposes, and with like effect.

Paragraph thirteenth also provided that, upon the death of the decedent's wife, a total of $21,000 should be paid to nine charitable organizations therein named (R. 16) and that, upon the death of his wife, and all other annuitants, or upon annuities being provided for all annuitants surviving her, $150,000 should be paid to Miriam Hospital, seven-eighths of the remainder to the Rhode Island Hospital, and the remaining one-eighth to certain named individuals (R. 17). The charitable nature of these bequests, except that of the one-eighth remainder, is conceded.

The petitioners valued the nine gifts, aggregating $21,000 as aforesaid, for purposes of the deduction claimed, "subject to the life estate" of the decedent's widow; the gift to Miriam Hospital at $79,125.50, and that to the Rhode Island Hospital at $1,233,024.55. The record does not, however, disclose the petitioners' method of valuing the two last mentioned gifts (R. 29–30).

In the years 1939 to 1942, inclusive, the trustees paid the following amounts to the widow under

the terms of the trust; in 1939, $21,594.91; in 1940, $21,836.81; in 1941, $24,054.38, and in 1942, $26,116.72. The trustees also paid $6,000 to the decedent's mother and a like amount to his sister in each of these years, except in 1942, when they paid nothing to the mother, who had died in November 1941 (R. 27); in addition, the trustees accumulated the following amounts of income (R. 31): In 1939, none; in 1940, $52,490.65; in 1941, $71,347.95; in 1942, $71,620.27. In addition thereto the executors of the decedent's will accumulated the following amounts of income: In 1939, $28,842.88; in 1940, $21,345.09; in 1941, $29,188.55; in 1942, $55,828.51 (R. 32).

The Commissioner disallowed the deduction on account of bequests to charity as not coming within the provisions of the Internal Revenue Code (Section 303 (a) of the Revenue Act of 1926, 44 Stat. 72, as amended; 26 U. S. C. 812 (d), *infra,* p. 9) and applicable regulations (R. 11). The Tax Court sustained the Commissioner's determination on the ground that the decision of this Court in the case of *Merchants Bank* v. *Commissioner,* 320 U. S. 256, was determinative here (R. 44–46). The court below affirmed the Tax Court's decision (R. 65).

ARGUMENT

The court below correctly held that this case is controlled by *Merchants Bank* v. *Commissioner,* in which the trustee had been authorized to in-

vade the corpus for the "comfort, support, maintenance, and/or happiness" of the testator's widow. This Court approved the applicable Treasury regulations which provided that to the extent that there is a power in a private donee or trustee to divert the property from charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." 320 U. S. at 260.

Substantially identical regulations are applicable here (Article 47, Regulations 80 (1937 edition), Appendix, *infra*, p. 11). In this case, the trustees in their "uncontrolled * * * discretion" were authorized to pay to the testator's wife so much of the principal as they may deem to be required for any purpose approved by them where the income "shall be insufficient to provide for her comfortable maintenance and support, or to meet the expense of any sickness, emergency or misfortune, or any other expense whether of a like or different kind, deemed by said Trustees to be proper for her comfort or pleasure * * *." (R. 15.)[1] And the trustees were given like powers to make payments of principal to the testator's mother and sister. (R. 15–16.) In the circumstances, it is clear that

[1] The will also directed that the powers and discretions should be "liberally construed for the personal benefit of my wife for the assurance of her comfortable maintenance and support". (R. 15.)

the *Merchants Bank* decision is dispositive of this case.

However, after the decision in the *Merchants Bank* case, both the Fourth and Ninth Circuit Courts of Appeals failed to give effect to the Treasury regulations. *Commissioner* v. *Robertson's Estate,* 141 F. 2d 855 (C. C. A. 4); *Commissioner* v. *Wells Fargo B. & U. Tr. Co.,* 145 F. 2d 130 (C. C. A. 9). In each of these cases the court proceeded upon the premise that the issue turned not upon the *character* of the power of invasion, but upon the *likelihood* of its exercise.[2] That approach was squarely in conflict with the *Merchants Bank* decision, and those decisions are therefore in conflict to that extent with the decision herein. Nevertheless, in view of the fact that the *Merchants Bank* decision so clearly controls this case, we oppose the granting of the petition.

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[2] While it is true that the Tax Court has, in cases decided since the *Merchants Bank* case, recognized the power of invasion test and undertaken to apply it (see e. g., *Estate of Wetherill* v. *Commissioner*, 4 T. C. 678, petition dismissed, 150 F. 2d 1019 (C. C. A. 9th); *Estate of Cutler, Jr.* v. *Commissioner*, 5 T. C. No. 159 (a decision reviewed by the full Tax Court); *Estate of Holmes* v. *Commissioner*, 5 T. C. No. 156, and *Estate of deCastro* v. *Commissioner*, decided June 19, 1945 (1945 P-H T. C. Memorandum Decisions Service, par. 45,209)), nevertheless, in doing so, it has neither overruled nor disapproved its former decisions based on the probability of invasion test.

Respectfully submitted.

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FEBRUARY 1946.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 303. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) [as amended by Section 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, * * *.

Treasury Regulations 80 (1937 edition):

> ART. 44. *Transfers for public, charitable, religious, etc., uses.*—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime not to exceed the value of the transferred property required to be included in the gross estate if in either case the property was transferred (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the

District of Columbia, for exclusively public purposes; or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes (including the encouragement of art and the prevention of cruelty to children or animals), if no part of the net earnings of the corporation or association inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; or (3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, if such transfers, legacies, bequests, or devises are to be used by such trustee, trustees, fraternal society, order, or association exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Article 10 indicates the principles to be applied in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to a charitable corporation, or to apply it to a charitable purpose, the present value of the

remainder is deductible. To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of article 10. If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of article 10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principles set forth in article 10, by one skilled in actuarial computations.

* * * * *

ART. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

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